In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 943

C. W. CAYWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals (Pet. App. 13-6) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 10, 1956 (Pet. App. 48). A petition for rehearing was denied on March 20, 1956 (Pet. App. 47). On March 27, 1956, Mr. Justice Douglas extended the time for filing a petition for

a writ of certiorari to May 15, 1956, and the petition was filed on May 14, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an indictment charging a conspiracy to defraud the United States of its right to have property which has been donated to states applied to educational purposes was returned within the applicable three-year period of limitations when the indictment charged and the proof showed sales of property by the conspirators within the three-year period, and the proof also showed that petitioner was the state officer in charge of such property within the three-year period.

STATUTES INVOLVED

Section 203(j)(1), Federal Property and Administrative Service Act of June 30, 1949, 63 Stat. 385, 40 U.S.C. 484(j)(1), provides in part:

> Under such regulations as he may prescribe, the Administrator is authorized in his discretion to donate for educational purposes or public health purposes, including research, in the States, Territories, and possessions without cost (except for costs of care and handling) * * * equipment, materials, books, or other supplies under the control of any executive agency * * *.

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States,

or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

Under the Federal Property and Administrative Service Act of 1949, *supra*, the Administrator of General Services is authorized to transfer to states for educational purposes surplus federal property. Requisitions for such property are made by authorized state officials on a form designated as DP-2, in which the applicant certifies, *inter alia*, that "the property requested will be distributed to eligible educational institutions for educational purposes on the basis of need and utilization" (R. 92). From January 1949 to January 25, 1951, petitioner was Assistant Superintendent of Public Instruction for Arizona authorized to sign requisitions for surplus property for the Arizona Educational Agency for Surplus Property (R. 113-114, 146).

On January 18, 1954, in the United States District Court for Arizona, petitioner and one Tompkins were indicted for conspiracy, running from April 20, 1949, to the date of indictment, to make false statements and cover up material facts in a matter within the jurisdiction of an agency of the United States, and to defraud the United States

in its right to have disposable donable surplus property distributed to eligible educational institutions under the applicable laws and regulations (R 3-16). The overt acts alleged in the indictment were (1) the submission by petitioner of various DP-2 forms requesting the allocation of surplus property to the Arizona Educational Agency, (2) peitioner's causing the receipt of the property by the Arizona Agency, and (3) the sale of the property by Tompkins to transferees who were not educational institutions and not entitled thereto (R. 6-16). All the applications and deliveries charged were alleged to have occurred in 1949 and 1950. The overt acts alleged to have occurred after January 18, 1951 (i.e., within three years of the return dae of the indictment), were sales of the surplus to,or payments by, private parties (Overt Acts 15 and 16 (R. 9-10), 21 (R. 11), 30-35 (R. 13-14), 3839 (R. 15-16).[1]

A motion by petitioner before trial to dismiss the indictment on the ground, *inter alia*, that it had no been returned within three years after the offense was completed (R. 16-18) was denied (R. 19).

The evidence at the trial was to the effect that peitioner, in his official capacity, made or authorized the requisitions on the DP-2 forms, as charged in he indictment (Ex. #1a-e, R. 113-121), and that

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[1]It was alleged in the indictment that the property when sold belonged to the United States. The trial judge held, however, that on delivery title passed to the State of Arizona, and he withdrew from the jury any aspects of embezzlement (R 415, 445).

the items involved were shipped to Arizona (R. 150-161, 185-186). Some of the equipment was taken to Tompkins' ranch (R. 205-207, 219-220). Other equipment was sent to the Arizona State Prison and, late in 1950, was taken from there, at the direction of Tompkins, to a tractor shop for repair (R. 193-194, 244-248). The equipment was sold by or on behalf of Tompkins, during 1950 and into 1951, including a sale in February, 1951, of equipment held at the repair shop (R. 240-241, 266-270, 285-289, 294, 307-309, 316, 320-321). Tompkins turned the proceeds over to his brother-in-law, a lawyer, for deposit in a special account (R. 329-344) from which payments (mostly by checks to cash, but some in petitioner's name) were made to petitioner (R. 347-359). Petitioner received about $10,000 as his share (R. 359, 363, 371).

No issue of the statute of limitations was raised at the trial, but at the close of the evidence petitioner renewed all motions theretofore made and not granted (R. 433).

The judge charged the jury in part (R. 441):

> Any improper interference with the United States Government in the discharge of its activities is deemed to be a fraud on the Government. In other words, here the United States by statute was trying to do something for the Arizona schools and officials were trying to carry out their sworn duty to effectuate the object of the statutes. But that their functioning under that statute was interfered with improperly by Defendant Caywood and col-

> laborated in by the other Defendant. In that they were not able to carry out that function, that is the scheme or fraud on the Government.

Both defendants were found guilty (R. 41), and petitioner was sentenced to imprisonment for eighteen months (R. 70). On appeal by petitioner (Tompkins did not appeal), the conviction was affirmed (Pet. App. 48), Judge Stephens dissenting on the ground that the statute of limitations barred the prosecution (Pet. App. 35-46). For the majority, Judge Fee expressed the view that the conspiracy was not completed until the property was sold, so that the sales within the three-year period of limitations were in furtherance of the conspiracy and sufficient to prevent the bar of the statute of limitations (Pet. App. 13-33). Judge Pope, concurring, was of the view that the offense might have been completed at the time of the delivery of the property to the Tompkins ranch if at that time the defendants were holding it for their own purposes exclusively, but that, since the holding at the ranch could also have been for later delivery to the state, the prosecution was not barred in the absence of a request by petitioner for a determination of that issue of fact as a basis for a judgment on the statute of limitations (Pet. App. 33-35). He also noted that the holding of property at the repair shop showed that the conspiracy was continuing into the three-year period (Pet. App. 33-35).

ARGUMENT

The core of the conspiracy in this case was the objective of defrauding the Federal Government in its purpose to dispose of surplus property for the benefit of state educational institutions, not to line the pockets of persons like petitioner and his co-defendant. This fact, plainly alleged in the indictment (R. 5) and proved at the trial (*supra*, pp. 4-5), destroys petitioner's basic premise that the indictment should be read as if it stopped after alleging (R. 3-5) that the conspiracy included false statements by petitioner in his official capacity in obtaining the allocation of the surplus property. Once it is recognized that the allocation to the state was only a first step to the ultimate purpose —the unlawful diversion of the property for the conspirators' personal profit—it becomes clear that the effort to interpose the statute of limitations must fail. On the undisputed principle petitioner invokes—that a conspiracy endures until its "chief objective" is accomplished (Pet. 7)—this conspiracy is within the limitations period.

It is also clear, in answer to the claimed need for certiorari, that the diversity of opinion in the court below stems, not from any disagreement as to the applicable law, but as to the application of settled principles to the particular facts presented by this case and this indictment. All three judges below recognize that there can be a continuing conspiracy and that the statute of limitations runs from the last overt act during the existence of the conspiracy, an overt act which must be in further-

ance of the conspiracy. *Fiswick* v. *United States*, 329 U. S. 211, 216. Judge Stephens, dissenting, was of the view that the "conspiracy was complete * * * with the overt acts of Caywood in signing and delivering the DP-2 forms to the government of the United States" (Pet. App. 38). Judge Pope was of the opinion that the conspiracy ended when the petitioners were holding the property "for their own purposes exclusively" (Pet. App. 34-35), but that, if petitioner wished to have the time of such exclusive holding determined, he should have raised the defense before the jury. Judge Fee thought the conspiracy did not come to an end until "frustration of the governmental purpose was complete" by the sales, that until "the transfers, the government of the United States was not yet irreparably defrauded" (Pet. App. 25).

There is no doubt, and Judge Stephens in dissent recognized (see Pet. App. 43), that the actual plan of the conspirators was to get the property, dispose of it, and divide the spoils. Thus, the partnership between the two conspirators was not interrupted and did not come to an end until the last sale, well within the period of limitations. There is not here, as in *Lutwak* v. *United States*, 344 U.S. 604, and *Krulewitch* v. *United States*, 336 U. S. 440, the accomplishment of the initial objective with a possible continuation of the conspiracy only for the purpose of concealing the accomplished purpose. Here the initial purpose, the initial agreement, was not complete until the spoils were realized and divided. Numerous cases have held that

where a conspiracy contemplates the obtaining of loot, in one form or another, the conspiracy does not come to an end with the criminal act of obtaining the property, but remains in existence until the spoils are divided. *Rettich* v. *United States*, 84 F. 2d 118, 121 (C.A. 1); *United States* v. *McGuire*, 64 F. 2d 485, 493 (C.A. 2), certiorari denied, 290 U. S. 645; *Bellande* v. *United States*, 25 F. 2d 1, 2 (C.A. 5), certiorari denied, 277 U. S. 607; *McDonald* v. *United States*, 89 F. 2d 128, 134 (C.A. 8), certiorari denied, 301 U. S. 697; *Skelly* v. *United States*, 76 F. 2d 483, 488-489 (C.A. 10), certiorari denied, 295 U. S. 757.[2] This principle is itself sufficient to sustain the conviction here.

The timeliness of the indictment may also be sustained on the narrower ground on which Judge Fee rested—that, without going to the ultimate division of the spoils, there was a continuing and uncompleted purpose to defraud the United States at least until the conspirators had disposed of the property. The conspiracy charged and proved embraced more than the making of false statements to the United States. The false DP-2 forms were merely the means of getting the property, not the

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[2] *Lonabaugh* v. *United States*, 179 Fed. 476 (C.A. 8), relied upon by petitioners, is distinguishable, for there the overt acts within the period of limitations occurred after the conspirators had accomplished their purpose. The only acts within the period of limitations were the transmittal of documents by the government (i.e., no act of the conspirators themselves), after title had passed, and a transfer of title from a nominee to a corporation, which was not a division among the conspirators, but merely a change of title after the conspirators had received their full share.

end in itself.[8] Until petitioner and his partner in crime obtained control of the property, they could not even begin to carry out their purpose of converting the property into money.

The suggestion by petitioner (Pet. 9-10) that there can be no defrauding of the United States by the misapplication of property given to states as grants-in-aid has no support in decided cases. It also has no support in logic. It is a proper and familiar federal function to grant property to the states for special purposes; it is an interference with and defeat of this federal function to divert the property from such special purposes. Hence such interference is a fraud against the United States within the established principles laid down in *Haas* v. *Henkel*, 216 U. S. 462, and *Hammerschmidt* v. *United States*, 265 U. S. 182. As we read *Langer* v. *United States*, 76 F. 2d 817 (C.A. 8), it is upon that principle, and not upon the reserved federal control of the funds, that the decision turns.

As Judge Fee pointed out in his opinion (Pet. App. 25), "the federal government could have intervened and compelled proper distribution of the property up until the time that each specific item got into the hands of an innocent purchaser for value." The case thus falls within the principles

[8] That factor distinguishes the case of *DeLuca* v. *United States*, 289 Fed. 741, 745 (C.A. 2), where the conspiracy charged was to obtain opium from federal warehouses and remove it without payment of charges. The court there found that the conspiracy charged came to an end with the removal

enunciated by this Court in *United States* v. *Kissel*, 218 U. S. 601, 607:

> * * * It is true that the unlawful agreement satisfied the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States* v. *Irvine*, 98 U. S. 450. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one.

So long as the property remained unsold, the central objective of the conspiracy was not accomplished, and it required the continuing cooperation of the conspirators to keep the property from the federal use for which it was dedicated. There was therefore a continuous and active purpose to defraud the federal government.

Even if one were to accept Judge Pope's view in his concurring opinion that, so far as the federal government was concerned, the fraud came to an end when the conspirators obtained the property as their own, the indictment was timely. So long as petitioner remained in office, any holding by him was necessarily equivocal and not a complete hold-

ing for his own purposes exclusively. Petitioner remained in office until January 25, 1951 (R. 146), within the period of limitations. That in itself establishes the timeliness of the indictment.[4]

CONCLUSION

The question presented involves only the application of settled principles to the particular facts of this case, and the judgment below is correct. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

JUNE, 1956.

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[4] Since we think that the undisputed facts establish the invalidity of the defense of the statute of limitations, we do not believe it necessary to reach the alternative basis for affirmance stated in Judge Pope's opinion—that petitioner should have sought a factual determination by the jury as to the termination of the conspiracy.

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